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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

v.

LYLE GERALD JOHNS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the warrantless probable cause search of bales of marijuana discovered in two pickup trucks, which would have been lawful if undertaken at the scene of the seizure or "soon" after the bales had been taken to the station house, was rendered unlawful by the passage of several days between seizure and search.

PARTIES TO THE PROCEEDING

In addition to the named respondent, Manuel Jesus Duarte, Roberto Leon Gomez, Dennis Eugene Hearron, Carlos Torres Leon, John Lizaraga Redmond, and Jose Oros Soto were defendants in the district court and are respondents here.

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LYLE GERALD JOHNS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 707 F.2d 1093. The district court's opinion (App. B, *infra*, 16a-28a) and its supplemental order and memorandum (App. C, *infra*, 29a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 33a) was entered on June 10, 1983. A petition

for rehearing was denied on January 4, 1984 (see App. E, *infra*, 34a). On February 27, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including April 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 1, 1981, a grand jury sitting in the District of Arizona returned a two-count indictment charging respondents with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Prior to trial, the district court granted respondents' motion to suppress the marijuana that was the basis of the prosecution, and the government appealed pursuant to 18 U.S.C. 3731. The court of appeals affirmed.

1. At approximately 1:30 a.m. on August 4, 1981, United States Customs Officer Scott Eshelman received a report from an unidentified informant of suspicious activity at the Tucson Dragway. The informant related that an airplane had landed at the location outside Tucson and had been met by a car. At the request of Customs officials, the County Sheriff's Department stopped the car as it was leaving the scene. No criminal activity was detected, but the occupants of the vehicle were identified as respondents Johns and Hearron. The two men were allowed to proceed on their way. This information was relayed to Officer Eshelman's superior, Customs Officer Dale Harper. Harper had been investigating Johns for some time and had information linking him with respondents Leon and Duarte in an international drug smuggling operation. App., *infra*, 2a, 17a-18a.

Based on the available information, Officer Harper decided to initiate surveillance at Leon's residence. Finding no vehicles at that location, Harper moved on to Duarte's residence. There he observed pickup trucks belonging to Leon and Duarte. After meeting a third vehicle at a nearby gasoline station, the two pickups proceeded east on Interstate Highway 10. Officer Harper contacted other Customs officers, who maintained ground and air surveillance on the two trucks as they traveled 100 miles to a private airstrip near Bowie, a small town located about 50 miles from the Mexican border. App., *infra*, 2a, 18a-19a.

Shortly after the trucks arrived at the airstrip the first of two small planes that were later identified as belonging to respondents Johns and Hearron landed. The agents on the ground were unable to see what transpired from their vantage point, but their counterparts in the air informed them that one of the pickup trucks had approached the first plane. That plane ultimately departed, and was followed by the second small plane, which landed and later departed. The Customs officers on the ground approached to investigate. As they approached the trucks they detected the odor of marijuana. One of the officers saw one of the respondents throwing a blanket over the contents of one of the trucks. In the trucks the officers found some 40 square packages wrapped in plastic and dark green trash bags secured with tape. App., *infra*, 2a, 19a-20a; 11/9/81 Tr. 134; 12/11/81 Tr. 35.[1]

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[1] One of the officers, an "experienced law enforcement officer[] with many years of on-the-job experience, including the investigation of marijuana cases" (App., *infra*, 22a n.2), testi-

Respondents Duarte, Leon, Gomez, Redmond and Soto were arrested on the ground at the airstrip. Before leaving the scene, the officers noticed some vegetable matter loose on the ground that they believed to be marijuana. Meanwhile, the two small planes were followed back to the vicinity of Tucson by Customs officers in the surveillance airplane. Respondents Hearron and Johns, the pilots, were arrested upon landing. App., *infra*, 2a, 21a-23a.

The packages and bags found in the two pickup trucks were transported to a Drug Enforcement Administration warehouse in Tucson. Subsequently—"[s]everal days" later by the district court's description (App., *infra*, 22a), but see pages 20-21 note 14, *infra*—DEA agents took core samples from some of the bales, which were sent for laboratory analysis and proved to be marijuana. App., *infra*, 2a, 22a.

2. All respondents moved to suppress the contraband, claiming that the warrantless search of the bales of marijuana violated their Fourth Amendment rights. Following an evidentiary hearing, the district court granted the suppression motion (App., *infra*, 16a-28a). Relying on *Robbins* v. *California*, 453 U.S. 420 (1981), the court held that the insubstantial nature of the containers searched did not excuse the officers' failure to secure a warrant (App., *infra*, 23a-27a). The district court refused to apply the auto-

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fied, based upon his experience, that marijuana is commonly packaged in this manner (*id.* at 20a).

At a supplementary hearing on the motion to suppress, one of the Customs officers testified, for the first time, that several of the bags in which the marijuana was found were torn in spots and that the contents of the bags, which appeared to be marijuana, were visible. The district court declined to credit this additional testimony (App., *infra*, 21a-22a n.2).

mobile exception to the warrant requirement on the ground that "[t]he defendants were arrested and the contraband secured at the DEA warehouse" before the search of the bags was carried out (*id.* at 24a). Finally, the district court declined to recognize a "plain odor" exception to the warrant requirement (*ibid.*) and found the evidence insufficient to establish that the plastic-wrapped bales "could have only held marijuana" (*id.* at 27a-28a).[2]

3. While this case was pending on appeal, this Court rendered its decision in *United States* v. *Ross*, 456 U.S. 798 (1982), in the process overruling *Robbins* v. *California*, *supra*, upon which the district court had relied.[3] *Ross* held that the automobile search exception to the warrant requirement permits the warrantless examination of the contents of containers found in a vehicle search conducted upon probable cause, provided that there is probable cause to believe that the container may contain the object of the search. The parties submitted supplemental

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[2] The district court initially found that respondents Johns and Hearron, the pilots, who had delivered the marijuana and departed from the Bowie airstrip prior to its seizure, had not established any "interest in the suppressed evidence" (App., *infra*, 28a) and accordingly lacked standing to seek suppression. But, responding to the court's invitation to supplement their showing in this regard, Johns and Hearron argued that they had made a bailment of the marijuana and retained rights therein sufficient to permit them to challenge the search of the bags. Although these assertions, if credited, would seem to establish that the other five respondents lacked "standing," the district court revised its order of suppression to benefit all respondents (App., *infra*, 29a-32a).

[3] The district court had rejected the government's suggestion that it defer final consideration of the suppression motions pending this Court's disposition of *Ross* (see App., *infra*, 32a).

memoranda addressing the significance of *Ross* for this case. Respondents argued that *Ross* should not be applied here because the search antedated the decision in that case, and asserted that probable cause in this case had focused exclusively upon the plastic wrapped bales and did not extend to the pickup trucks, so that this case would be controlled by *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), rather than *Ross*.

While it rejected respondents' arguments respecting the application of *Ross*, the court of appeals nevertheless affirmed the order of suppression (App., *infra*, 1a-15a).[4] The court concluded initially that because *Ross* establishes that warrantless container searches subject to the automobile search doctrine are *not* unlawful, and no legitimate reliance interest would be undercut by its application, *Ross* is fully applicable to searches that antedated its rendition (*id.* at 6a-8a). Second, the court of appeals determined that the focus of the officers' suspicion here was not exclusively upon the plastic-wrapped bales. Emphasizing that law enforcement officers were unable to see the transfer of the bales from the airplane to the pickup trucks, and that the officers did not know the nature and packaging of the contraband transferred before arriving on the scene, the court explained (*id.* at 8a-9a) that "it was not obvious that all the contraband would be in the bales. The [respondents] could have easily secreted other drugs elsewhere in the vehicles."

Although the court of appeals acknowledged that "[t]he officers had probable cause to search both

[4] The court of appeals upheld the district court's ruling according "standing" to the pilots, respondents Johns and Hearron (App., *infra*, 13a-15a).

[pickup] trucks" and that, "[u]nder *Ross*, they also could have opened the packages [without a warrant] as part of that search" even after the packages had been secured at the DEA warehouse (App., *infra*, 9a, 13a), the court held that the taking of core samples from the bags without a warrant was unlawful because of the time elapsed—three days according to the court's account of the facts (*id.* at 2a, 9a), but see pages 20-21 note 14, *infra*—between the seizure of the bags and the ensuing search. The court relied on cases holding that the search incident to arrest doctrine does not permit a warrantless search of property seized from an arrested suspect after the arrest encounter is completed (*id.* at 9a-11a). The court also relied upon the characterization in *Ross*, 456 U.S. at 807 n.9, of *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970), as extending the automobile search exception to station house searches conducted "soon" after a seizure. The court reasoned that the practical difficulties of guarding an automobile stopped on the highway and the possible dangers of an on-the-spot search—which it believed to be the basis for this extension—"do not apply to a container that may be removed from the vehicle and secured by the police" (App., *infra*, 12a).

Observing that *Ross* had not overruled *Chadwick* or *Sanders*, and that those cases require that a warrant be obtained to conduct a probable cause search of a container not subject to the automobile search doctrine, the court of appeals stated that *Ross* did not justify a warrantless search of "containers no longer in an automobile and secured by the police for three days" prior to the search (App., *infra*, 12a). It stated that the bases for the automobile warrant exception—which it described as the inherent mobil-

ity of automobiles and the impracticability of securing a warrant in cases involving the transportation of contraband—do not apply in these circumstances (*id.* at 13a, 15a). Nor did the court of appeals believe that *Ross* "so destroys the expectation of privacy in a container subject to an automobile search that the container is thereafter subject to search without a warrant" (*id.* at 12a). The court concluded that because the officers "could have easily obtained a warrant" (*id.* at 13a) during the three days between seizure and search, their failure to do so rendered the search unlawful.

The court of appeals also rejected the government's alternative contention that the plain odor of marijuana emanating from the plastic-wrapped bales made it unnecessary to obtain a warrant prior to the search of the packages (App., *infra*, 3a-6a). Although it recognized the contrary decision of the Fourth Circuit in *United States* v. *Haley*, 669 F.2d 201, 203-204 & n.3, cert. denied, 457 U.S. 1117 (1982), the court of appeals held that the odor provided no more than probable cause and that the parcels "did not announce their contents with sufficient clarity to eliminate the need for a warrant" under the exception to the warrant requirement recognized in *Arkansas* v. *Sanders*, 442 U.S. at 764-765 n.13 (App., *infra*, 4a-5a & n.2).

REASONS FOR GRANTING THE PETITION

This is a case in which law enforcement officers lawfully seized two pickup trucks at a remote airstrip near the Mexican border after observing a clandestine nighttime rendezvous between the trucks and two small aircraft. The initial, concededly lawful search of the trucks disclosed that they contained some 40 bales from which the distinct odor of marijuana was emanating. The court of appeals acknowledged that the officers could lawfully have opened the bales on the spot without a warrant, even though all suspects on the scene had been arrested, the trucks were in the custody of the agents, and there was no longer any substantial risk that the bales could be removed or destroyed in the time that would be required to procure a search warrant. Nevertheless, no doubt in large part because the officers already knew (as well as anything can be "known") what the bales contained, they did not go through the empty formality of opening the bales at the time. Several days later, however, they extracted core samples of the substance contained in the bales and sent them to a laboratory for chemical analysis. Because of the delay in undertaking this action, the court of appeals held that a warrant was required and suppressed the marijuana as evidence.

The decision of the court of appeals imposes an arbitrary restriction upon warrantless probable cause automobile searches based upon an aberrant analysis that is incompatible with this Court's decisions. What this Court had painstakingly clarified in a series of decisions from *Chambers* v. *Maroney*, 399 U.S. 42 (1970), through *United States* v. *Ross*, 456 U.S. 798 (1982), has been cast into new confusion by the decision below. Review by this Court is appropriate to rectify this result.

1.a. *Ross* held that the automobile search exception to the warrant requirement recognized in *Carroll* v. *United States*, 267 U.S. 132 (1925), *Chambers* v. *Maroney*, *supra*, and other cases extends to all "containers and packages found inside the vehicle" (456 U.S. at 820; see also *id.* at 822) "in which there is probable cause to believe that [the object of the search] may be found" (*id.* at 824). The Court ob-

served that a warrant to search a vehicle would suffice to authorize the search of containers found therein that could contain the object of the search (*id.* at 821), and it concluded that "the scope of the warrantless search authorized by [the automobile search] exception is no broader *and no narrower* than a magistrate could legitimately authorize by warrant" (*id.* at 825 (emphasis added)). "When a legitimate search is under way * * * nice distinctions between * * * glove compartments, upholstered seats, trunks, and wrapped packages * * * must give way," the Court stated (*id.* at 821), explaining (*id.* at 821 n.28):

> The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed.

b. The court of appeals' conclusion that a container discovered in the course of a lawful warrantless automobile search may not itself be searched without a warrant because of a lapse of three days between the seizure and completion of the search finds no support in *Ross* or any other decision of this Court. Contrary to the court of appeals' belief (App., *infra*, 12a), *Ross* does not carve out a novel exception to the warrant requirement reflected in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), that must be narrowly construed. Rather, it simply applies the well-established automobile search doctrine recognized in *Carroll* and its progeny to searches of containers found in the course of an auto search (see 456 U.S. at 825). Such container searches were held to be analytically inseparable from the search of an

automobile. Thus *Ross* imports no special limitations upon the automobile search doctrine. The question in this case accordingly must be resolved by reference to this Court's decisions that address the permissible scope of warrantless automobile searches. Those cases indicate that the automobile search doctrine is not rendered inapplicable by the passage of time between seizure of an automobile and completion of a search.

In *Chambers* v. *Maroney*, the Court rejected a challenge to a warrantless station house search of an automobile, conducted at a time when no exigency rendered procurement of a warrant impracticable. The Court first observed that, because probable cause was present, the vehicle could have been searched on the spot without a warrant at the time it was stopped (399 U.S. at 47-52). But the Court declined to limit the opportunity for a lawful warrantless search of the vehicle to the time and place of the seizure, observing that "[t]he probable-cause factor still obtained at the station house" (*id.* at 52). The Court did not comment upon the amount of time that had elapsed between the seizure and the search; plainly it was not a material consideration in the Court's analysis.[5]

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[5] The district court and the court of appeals had upheld the delayed automobile search on a search incident to arrest theory, reasoning that, because it was dark at the time of the arrest (and the seizure of the automobile), it was reasonable to defer the search until it could be conducted at the station house. See *United States ex rel. Chambers* v. *Maroney*, 408 F.2d 1186, 1192 (3d Cir. 1969), aff'g 281 F. Supp. 96, 100 (W.D. Pa. 1968). But this Court rejected the search incident to arrest rationale of the lower courts, stating "the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer

In *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), the Court sustained the warrantless search of the trunk of an automobile that had been towed to a private garage at the direction of police after an automobile accident leading to the arrest of the driver (a police officer) for drunken driving. The search, intended to recover the arrestee's service revolver, did not take place at the scene of the accident, but was conducted at the garage several hours later. The search was sustained on a community protection rationale. Again there was no suggestion that there is any requirement that a warrantless search be conducted at the earliest practical opportunity. Nor was there any such suggestion in *Cardwell* v. *Lewis*, 417 U.S. 583 (1974). Even though the examination of a car did not take place until the day after the seizure (see *id.* at 587-588), *Chambers* v. *Maroney* was deemed controlling. *Id.* at 593-596 (opinion of Blackmun, J.). Significantly, the Court's only comment on the delay

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obtain when the accused is safely in custody at the station house" (399 U.S. at 47). The Court instead sustained the challenged search under the *Carroll* doctrine.

Chambers thus indicates that warrantless automobile searches are free of the contemporaneity requirements ordinarily applicable to searches incident to arrest. The court of appeals' reliance in this case upon its decisions under the search incident to arrest doctrine (App., *infra*, 9a-11a) accordingly is misplaced. Unlike searches incident to arrest, which do not rest on probable cause and are ordinarily predicated upon the circumstances existing at the time of arrest, the justification for a warrantless automobile search, probable cause, does not disappear with the passage of time in a case like this. See pages 16-20, *infra*.

was that it precluded justification of the search as an incident of the arrest. *Id.* at 591 n.7.[6]

The Court's opinion upholding a station house automobile search in *Texas* v. *White*, 423 U.S. 67 (1975), confirms that prompt completion of such a search is not a requirement of the *Carroll/Chambers* doctrine. The Court simply stated that, as in *Chambers*, " '[t]he probable cause factor' that developed at the scene 'still obtained at the station house' " (423 U.S. at 68, quoting *Chambers*, 399 U.S. at 52 (brackets in original)). In the Court's view, a sufficient basis for the search was that "there was probable cause to search respondent's car" (423 U.S. at 68).[7]

Thus this Court's automobile search decisions do not require that a station house search be conducted at any particular time following a seizure. More generally, the Court has repeatedly rejected the notion that the validity of warrantless automobile searches is somehow conditioned upon exigent circumstances that make securing of a warrant impractical. See *United States* v. *Chadwick*, 433 U.S. at 12-13; *Cardwell* v. *Lewis*, 417 U.S. at 595-596 (opinion of Blackmun, J.) ("[W]e know of no case or principle that suggests that the right to search on probable cause * * * [is] foreclosed if a warrant was not ob-

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[6] The Court did observe that completion of the investigating procedures involved in the case could have required that the seizure of the automobile be prolonged for a significant time period. 417 U.S. at 595 n.11 (opinion of Blackmun, J.)

[7] Justice Marshall, joined by Justice Brennan in dissent, stated that it was irrelevant that the search was completed more promptly than a warrant could have been obtained, observing that "*Chambers* took such time elements out of the equation" (423 U.S. at 72 n.*).

tained at the first practicable moment."); *Husty* v. *United States*, 282 U.S. 694, 701 (1931).

Cooper v. *California*, 386 U.S. 58 (1967), upheld the warrantless search of an automobile that did not take place until a full week after the date of seizure (see *id.* at 58). The Court squarely rejected the suggestion—echoed by the court of appeals in this case (App., *infra*, 13a)—that because sufficient time was available to procure a warrant one accordingly was required (386 U.S. at 62):

> It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States* v. *Rabinowitz*, 339 U.S. 56, 66.

The time limits imposed upon warrantless searches by the court below are irreconcilable with *Cooper* and the analysis employed by this Court's automobile search decisions generally.[8] They also contravene the general principle of Fourth Amendment analysis employed by this Court that "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Cady* v. *Dombrowski*, 413 U.S. at 447; see also *Illinois* v. *Lafayette*, No. 81-1859 (June 20, 1983), slip op. 8.

c. *Ross* itself strongly suggests that the court of appeals misapprehended the scope of the automobile search doctrine. The court of appeals seized upon

[8] While the doctrinal basis of *Cooper* is not entirely clear (see 386 U.S. at 61; cf. *Ross*, 456 U.S. at 809 n.11), it rests at least in part upon the diminished expectation of privacy surrounding an automobile, and bears a close family relationship to the automobile search doctrine. See *Chadwick*, 433 U.S. at 12; see also *Cady* v. *Dombrowski*, 413 U.S. at 439-448. No principled basis exists for distinguishing *Cooper* here.

the observation in a footnote in *Ross*, 456 U.S. at 807 n.9, that *Chambers* v. *Maroney* and *Texas* v. *White* establish that if an immediate search on the street is permissible without a warrant, a search "soon thereafter" is permissible (App., *infra*, 11a). But this descriptive passage simply alluded to and reaffirmed the teaching of *Chambers* and *White*. It obviously was not intended to create or define an outside temporal limit upon the completion of a warrantless automobile search.[9]

In fact, the principle inferred by the court of appeals is contrary to the rule stated repeatedly by the Court in *Ross* (456 U.S. at 823, 825): that the scope of a warrantless automobile search is commensurate with that which a magistrate could authorize based upon the probable cause available to the officers. If the search of the respondents' pickup trucks had been authorized by warrant, the officers undertaking the search of the bales of marijuana would not have been required to procure a second warrant to complete that procedure simply because three days had elapsed between the seizure of the bales and their opening. Cf. *Ross*, 456 U.S. at 820-821 & n.27. Rather, absent a showing that the completion of the search violated the reasonableness standard of the Fourth Amendment in some concrete respect (or violated the time limit fixed by the original warrant), completion of the search would have been authorized by the original

[9] The facts of *Ross* include both a preliminary on-the-street search of an automobile trunk in which a container (a paper bag) was opened, and a subsequent, more thorough, station house search of the car in which an additional container (a zippered red leather pouch) was opened (456 U.S. at 801). Ross argued (Resp. Br. at 6-7, 13-21) that *Chambers* v. *Maroney* should be overruled. But he did not argue that the timing of the station house search was impermissible.

warrant. There is no more justification here than in the hypothetical case we have posed for requiring an additional authorization for completion of the search.[10]

d. Contrary to the court of appeals' suggestion (App., *infra*, 11a-12a), the policies that underlie extension of the auto search doctrine to encompass station house searches subsequent to a seizure are not rendered inapplicable by the passage of time between the seizure and search. As this Court explained in *Ross*, 456 U.S. at 807 n.9, warrantless station house searches are permitted both because of the "practicalities of the situations presented"—*i.e.*, the hardship and inconvenience that might result if a warrantless search could be undertaken only at the scene of the seizure—and because of the "relatively minor protection that a contrary rule would provide for privacy interests." While the first of these factors may shed little light on the question whether a station house search must be undertaken at the earliest practical time, the second factor has undiminished vitality

[10] We note that while the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched or the persons or things to be seized," there is no comparable requirement that the timing of a search be specified, much less that it be stated with particularity. Fed. R. Crim. P. 41 (c) (1) requires, however, that a warrant specify a period of time not to exceed ten days, within which it is to be executed. The search in this case obviously was completed considerably more promptly than that. While even the ten day limit would serve little purpose in the present context (see pages 19-20, *infra*), it is clear, at a minimum, that the court of appeals' decision has the effect of restricting warrantless automobile searches to a narrower compass than a warrant would have authorized.

in this setting. Moreover, the Court has made clear that no case-by-case examination of the strength of these factors in a particular setting is required, but rather that the doctrine is an effort to formulate a "more general rule" that is reasonable for the broad run of cases, even if application to particular cases may "appear unsatisfactory" (*ibid.*). Accordingly, the policies underlying *Chambers* and *Ross* are fully applicable here.[11]

The court of appeals seemed to assume (App., *infra*, 12a) that because of the separation of the bales from the trucks the automobile search doctrine could no longer apply, and that the bales had to be regarded as containers subject to the warrant requirement of *Chadwick* and *Sanders*. But reliance on this location factor misses the point of this Court's decisions. The applicability of *Ross* depends not on the location of a container at some time after the search of a vehicle has begun, but upon the focus of the probable cause that authorized the automobile search and the warrantless seizure of the container. 456 U.S. at 818-819, 823-824. Obviously, at some juncture in the course of an automobile search that discloses the presence of containers that are suspected

[11] Thus the court of appeals' assertion (App., *infra*, 12a) that the rationale for permitting station house searches "do[es] not apply to a container that may be removed from the vehicle and secured by police" is simply incorrect. In any event, this reasoning, which the court of appeals attributed to *Chadwick*, is inconsistent with the fundamental premise of *Ross*—that the search of a container found in the course of an automobile search should be regarded as part of the automobile search.

of harboring the object of the search, the containers ordinarily will be separated from the vehicle. Indeed, this separation will often occur at or before the time the container is secured in police custody at the station house. Insofar as the decision of the court of appeals depends on removal of the containers from the vehicle rather than on the passage of time, it accordingly would have the effect of rendering *Chambers* inapplicable to searches of suspicious containers discovered in the course of a lawful warrantless automobile search. This result would largely overrule *Ross*, which teaches that such searches are not to be distinguished from the search of an automobile itself. See also *New York* v. *Belton*, 453 U.S. 454, 461-462 n.5 (1981).[12] And subsequent to *Ross*, in *Michigan* v. *Thomas*, 458 U.S. 259 (1982), this Court has once again emphasized that the automobile search doctrine is not to be limited as the court of appeals did here.[13]

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[12] In *Belton* the Court rejected the "fallacious theory" that a seizure of property associated with a defendant afforded police such complete control over the encounter as to eliminate the justification for a search incident to arrest, noting that under this analysis "no search or seizure incident to a lawful custodial arrest would ever be valid" (453 U.S. at 462 n.5). The decision below adopts a comparably fallacious approach to the search of containers found in an automobile search.

[13] *Thomas* states (458 U.S. at 261):

> In *Chambers* v. *Maroney*, 399 U.S. 42 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas* v. *White*, 423 U.S. 67 (1975). See

Accordingly, there is no principled justification for the court of appeals' conclusion that the passage of time between seizure of the marijuana and the taking of core samples rendered the automobile search doctrine inapplicable here. Nor is any legitimate interest of an owner of seized property invaded by permitting a warrantless search in circumstances such as are presented here. Rather than identify any such interest, the court of appeals was content to suggest (App., *infra*, 13a) that the policies underlying the automobile search doctrine itself have no application here. This simply ignores the "diminished expectation of privacy which surrounds the automobile," which provides a principal justification for the automobile search doctrine itself. See *United States* v. *Chadwick*, 433 U.S. at 12; see also *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). *Ross* teaches that this diminished expectation of privacy extends both to "a vehicle and its contents * * * if probable cause is given to believe that the vehicle is transporting contraband" (456 U.S. at 823), and reaffirms that limiting warrantless searches to on-the-spot examinations undertaken immediately would provide no significant protection for privacy interests (*id.* at 807 n.9).

The court of appeals did not explain how the passage of time between seizure of a container and its search serves at all to alter the individual's expectation of privacy in the container. In fact, the residual expectation of privacy in these circumstances is

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> also *United States* v. *Ross*, 456 U.S. 798, 807, n.9 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized * * *.

neglible, at best. Because the officers needed no warrant—even under the court of appeals' view of the law—to open the bales they had seized at the Bowie airstrip or "soon" after their arrival at the DEA warehouse, any expectation that their contents would remain secret here would be wholly unreasonable. See *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5, 7-8; *United States* v. *Edwards*, 415 U.S. 800, 805-808 (1974).

The pointlessness of the Ninth Circuit's rule is especially evident on the facts of this case, because the clear odor of marijuana emanating from the large cache of marijuana seized, as well as the characteristic appearance of the marijuana bales and the events preceding the seizure, obviated any need for an investigative search to ascertain the nature of the contents of the bales. Indeed, on the facts of this case a strong argument could be made that the containers announced their contents and accordingly "by their very nature [could not] support any reasonable expectation of privacy" sufficient to trigger a warrant requirement. *Arkansas* v. *Sanders*, 442 U.S. at 764-765 n.13; see *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 10 n.17; *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 5-6 & n.5 (Stevens, J., concurring in the judgment). But there is no need to reach that question here; at a minimum, the odor and appearance of the marijuana bales assuredly was sufficient to preclude any enhanced expectation of privacy from arising because of the lapse of time between the seizure and the actual penetration of the interior of the bales. Assuming that a significant delay in completing the search in fact occurred here,[14]

[14] We do not believe that the record supports the court of appeals' characterization of the facts of this case in this regard. The only evidence of which we are aware that bears on this point indicates that the core samples were taken the day after the seizure (12/11/81 Tr. 61). In the court of appeals respondents Duarte, Leon, Soto, Gomez and Redmond asserted (Br. 3) that there had been a lapse of three days, but the stipulation reflected in the transcript pages cited in support of this assertion (11/9/91 Tr. 5) simply does not address the timing of the station house search. Our argument in this Court, however, does not in any respect depend upon our disagreement with the court below as to these facts.

the explanation appears to be that the officers were justifiably confident that they already knew precisely what they had found. In these circumstances, it is peculiar indeed to conclude that the mere passage of a few days' time made unreasonable the next investigative step preparatory to prosecution: the removal of core samples for laboratory analysis.[15]

2.a. The court of appeals' decision conflicts with the decisions of other courts of appeals that have understood *Ross* to be applicable in circumstances remarkably similar to those presented here. For instance, in *United States* v. *Rivera*, 684 F.2d 308 (5th Cir. 1982), the court of appeals concluded that *Ross* required it to uphold a warrantless search of plastic wrapped bundles that proved to contain marijuana.[16] Yet the search in that case—which, as in this case, took the form of extraction of core samples from the bales of marijuana—occurred more than 48 hours after the seizure of the bales. See *United States* v.

[15] Indeed, if anything, delay in the conduct of the search is beneficial to persons whose property has been seized, since it affords them an opportunity, if they have a substantial challenge to the lawfulness of the seizure, to move for relief under Fed. R. Crim. P. 41(e) before any search occurs.

[16] *Rivera* had been held by the court of appeals, upon the government's petition for rehearing, pending this Court's decision in *Ross* (see 684 F.2d at 309).

Rivera, 654 F.2d 1048, 1050 (5th Cir. 1981).[17] Similarly, in *Sharpe* v. *United States*, 712 F.2d 65 (4th Cir. 1983), petition for cert. pending on other issues, No. 83-529, the court of appeals recognized that *Ross* required it to "disavow" as "no longer valid" its prior ruling that a warrantless search of marijuana bales seized in the search of a pickup truck was unlawful. Yet the search in question had occurred at least two or three days after the seizure. See *Sharpe* v. *United States*, 660 F.2d 967, 969 (4th Cir. 1981).[18] The Third Circuit has also expressed an understanding of this Court's teaching on the timing of automobile searches that is inconsistent with that of the Ninth Circuit. *United States* v. *Schecter*, 717 F.2d 864, 870-871 (1983).

b. As we have indicated (pages 19-21, *supra*), the decision of the court of appeals does not serve to protect any legitimate or reasonable expecta-

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[17] The cited opinion is the initial opinion of the Fifth Circuit in *Rivera*, which was vacated by that court following this Court's decision in *Ross*.

[18] This Court granted our petition for a writ of certiorari seeking review of the court of appeals' 1981 decision in *Sharpe*, vacated the court of appeals' judgment, and remanded for further consideration in light of *Ross*. *United States* v. *Sharpe*, 457 U.S. 1127 (1982). That remand prompted the court of appeals' disavowal of its prior ruling on the warrant issue. We note that when the case initially came before the court of appeals, in 1981, Judge Russell, in dissent, had emphasized that the bales had not been opened for two or three days and had concluded, in light of *Chambers* v. *Maroney*, that the delay had no legal significance. 660 F.2d at 981-982. The court of appeals' ultimate conclusion on remand that *Ross* controlled the search issue in the case accordingly cannot be attributed to failure to consider the significance, if any, of the delay.

tion of privacy that could be harbored by the owner of a suspicious container seized by police upon probable cause in the course of a legitimate warrantless search of a motor vehicle. Nor does the arbitrary time limit adopted advance any other identifiable interest of such individuals. On the contrary, if it is required, the police will simply adopt the practice of completing searches at the place of seizure or shortly after the property has been secured at the station house—albeit at some cost to the timely accomplishment of other law enforcement tasks that are objectively more pressing, such as attending to the prompt initial appearance of arrested suspects before a judicial officer or preparing contemporaneous reports of their investigations.

Of course, there may be cases in which it is impossible to complete a search within the ambiguously defined interval allowed by the court of appeals. See, *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. at 595 n.11 (opinion of Blackmun, J.). It is not at all clear from the court of appeals' opinion whether a warrant would be required where the court is satisfied that the delay meets some standard of reasonable justification, or, perhaps, absolute necessity. But even assuming that the court of appeals would not press the present ruling that far, the result would be to thrust upon the courts the burden of assessing, on a case by case basis, whether the delay was "too long" in light of the factors that explain it, even though the outcome of this inquiry in no way promotes substantial individual privacy interests.

c. In *Ross* the Court undertook to provide "clarification" (456 U.S. at 804) concerning the scope of the automobile search doctrine and its application to containers that are found in the course of an auto-

mobile search. The Court noted the special "importance of striving for clarification in this area of the law," observing that "countless vehicles are stopped on highways and public streets everyday, and * * * that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle" (*id.* at 803-804). For the same reasons, it is appropriate for the Court to restore the clarity that prevailed prior to the decision of the court below. Because the decision of the court of appeals appears so plainly to conflict with this Court's decision in *Ross* and the consistent thread of this Court's other automobile search decisions, summary reversal may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 82-1080

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LYLE GERALD JOHNS, DENNIS EUGENE HEARRON, MANUEL JESUS DUARTE, CARLOS TORRES LEON, JOSE OROS SOTO, ROBERTO LEON GOMEZ, and JOHN LIZARAGA REDMOND, DEFENDANTS-APPELLEES

Argued and Submitted Nov. 12, 1982

Decided June 10, 1983

Appeal from the United States District Court
for the District of Arizona

Before TRASK, ANDERSON, and CANBY, Circuit Judges.

CANBY, Circuit Judge.

United States Customs Officers seized securely wrapped packages of marijuana from two covered pickup trucks and, three days later, opened the packages without a warrant. The trial court granted the defendants' motion to suppress the evidence. The government appeals, raising several possible exceptions to the warrant requirement. We conclude that this warrantless search violated the Fourth Amendment and accordingly, we affirm.

FACTS

After midnight on Tuesday, August 4, 1981, customs officers, suspecting that a drug transaction might occur, began ground and air surveillance of two trucks. Shortly after the trucks stopped near a remote private airstrip southeast of Bowie, Arizona, two small airplanes landed in sequence. After both planes left, the officers approached the two trucks and smelled the odor of marijuana in the general area of the trucks. An officer looked inside the trucks and discovered several sealed boxes and plastic bags. Officers then arrested the five defendants present at the two trucks; later, other officers arrested the two airplane pilots. The agents seized the boxes and bags and took them to the Drug Enforcement Administration warehouse in Tucson, Arizona. Three days later, without obtaining a search warrant, federal agents opened some of the bales and took core samples, which laboratory analysis proved were marijuana.

After a hearing, the district court granted a motion to suppress the evidence seized. Initially, the court suppressed the evidence only against the five defendants arrested at the trucks, but later the court amended its order to include the two pilots as well.

DISCUSSION

The government contends that the trial court erroneously suppressed the packages of marijuana seized from the trucks. The government asserts that two exceptions to the warrant requirement potentially apply here. Under the government's first theory, the marijuana in the wrapped bales was in plain view. Alternatively, the government proposes that the agents had authority to search the bales under the automobile exception. In addition, the govern-

ment argues that, even if the search here fits within neither exception, Johns and Hearron, the airplane pilots, lacked an expectation of privacy that would permit them to challenge the search. We take each issue in turn.

I. *Plain View*

The government argues that because of the surrounding circumstances and the odor of marijuana coming from the trucks, no warrant was required to open the packages because the contents were in plain view.[1] When officers are legitimately in a location where they observe an unconcealed object, the discovery does not constitute a search. *See Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); *Ker v. California*, 374 U.S. 23, 42-43, 83 S.Ct. 1623, 1634-35, 10 L.Ed.2d 726 (1963).

The government relies on the experience of the officers, the extent of the investigation, and the circumstances of the seizure as the basis for its contention that the contents of the packages were in plain view. The government draws some support from the recently decided case of *Texas v. Brown*, —— U.S. ——, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), in which the plain view doctrine was applied to uphold the warrantless seizure of an opaque, knotted party

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[1] The government also argued that the wrapped containers were "mere cargo," to which no Fourth Amendment privacy interests attached. Distinctions based on the likelihood that a particular closed, opaque container contains personal effects are no longer permissible. *See United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572 (1982). Since *Ross*, we no longer need distinguish between "worthy" and "unworthy" containers.

balloon containing heroin. As we read the plurality and concurring opinions in *Brown*, however, they establish only that the *seizure* of the container in plain view was justified when there was probable cause to believe that it contained contraband. We have no difficulty in agreeing that in the present case, the officers acted lawfully and justifiably in seizing the packages. It is a different question, however, whether an opaque container that is properly seized may be searched.

> If a movable container is in plain view, seizure does not implicate any privacy interests. Therefore, if there is probable cause to believe it contains contraband, the owner's possessory interest in the container must yield to society's interest in making sure that the contraband does not vanish during the time it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed. Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate.

Id. —— U.S. at ——, 103 S.Ct. at 1547 (Stevens, J., joined by Brennan, Marshall, JJ., concurring). We conclude, therefore, that *Brown* does not support the warrantless search here.[2]

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[2] We decline to hold that the contents of the wrapped bales were in plain view as "containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because

The government contends that the odor detected by the agents, emanating from the marijuana, brought that contraband into plain view. The Fourth Circuit does consider a package which gives off a distinctive odor to be like a package wrapped in transparent material, making the contents objectively obvious. *United States v. Haley*, 669 F.2d 201, 203-04 & n.3 (4th Cir.), *cert. denied*, 457 U.S. 1117, 102 S.Ct. 2928, 73 L.Ed.2d 1329 (1982). Our precedent, however, directs that while the odor of marijuana smelled by the agents would contribute to probable cause to believe that the container held contraband, a recognized exception to the warrant requirement was necessary to justify a warrantless search. *United States*

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their contents can be inferred from their outward appearance." *Ross*, 102 S.Ct. at 2167 n. 19 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13, 99 S.Ct. 2586, 2593 n. 13, 61 L.Ed.2d 235 (1979)). *See also Robbins v. California*, 453 U.S. 420, 427-28, 101 S.Ct. 2841, 2846-47, 69 L.Ed.2d 744 (1981). The wrapped bales here did not announce their contents with sufficient clarity to eliminate the need for a warrant. The government implicitly recognized that fact in the district court. At the reopened hearing on the motion to suppress, a government witness testified that the packages were torn, exposing the marijuana to plain view and obviating the necessity of opening the packages to remove samples. The trial court found this strikingly new testimony to be not credible.

Nor can we say that the viewing of the packages by the agents in this case was "inadvertent," as required for application of the plain view doctrine by the plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 470, 91 S.Ct. 2022, 2040, 29 L.Ed.2d 564 (1971). We do not rest our decision on this ground because it is uncertain whether the "inadvertence" requirement survived *Texas v. Brown*, —— U.S. ——, ——, 103 S.Ct. 1535, 1542-44, 75 L.Ed.2d 502 (1983) (plurality opinion of Rehnquist, J.; concurring opinion of White, J.).

v. Ogden, 485 F.2d 536, 539-40 (9th Cir. 1973), *cert. denied*, 416 U.S. 987, 94 S.Ct. 2392, 40 L.Ed.2d 764 (1974).[3] The odor and circumstances of the seizure supplied the probable cause for a search warrant. They did not eliminate the need for one.

II. *Automobile Exception*

The government next contends that the warrantless search was justified under the automobile exception to the warrant requirement. For that contention to succeed, three conditions must be met. First, the Supreme Court's decision in *United States* v. *Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), must have retroactive effect. Second, *Ross* must apply to the facts of this case. Finally, the three-day delay must not invalidate the warrantless automobile search.

A. The Retroactivity of *Ross*

In *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982), the Supreme Court rejected the rule of *Robbins v. Califor-*

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[3] Thus, most of our cases turn on whether the automobile exception, as then defined, applied to the searches of the containers. *See, e.g., United States v. Solomon*, 528 F.2d 88 (9th Cir. 1975); *United States v. Gibbs*, 435 F.2d 621 (9th Cir. 1970), *cert. denied*, 401 U.S. 994, 91 S.Ct. 1233, 28 L.Ed.2d 532 (1971).

The Second Circuit also has rejected the view that a distinctive odor can bring the contents of a container into plain view. *United States v. Dien*, 609 F.2d 1038, 1045 (2d Cir. 1979). *See also United States v. Johnson*, 588 F.2d 147 (5th Cir. 1979). While the results in *Dien* and *Johnson* would be different now after *Ross*, that does not affect their analysis of whether the odor of marijuana in the vehicle brings the contents of the packages into plain view.

nia, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), relied on by the district court when it granted the defendants' suppression motion. In *Robbins*, the Court considered whether police officers entitled to conduct a warrantless search of an automobile stopped on a public roadway may open a container found within the vehicle. The Court reversed Robbins' conviction on the ground that a closed opaque container "may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile." *Id.* at 428, 101 S.Ct. at 2847.

The following year, in *Ross*, the Court reexamined the automobile exception and concluded that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." 102 S.Ct. at 2172. The government argues that the decision in *Ross* must control here, requiring reversal, while the appellees contend that the decision should not be given retroactive effect.

This court already has applied *Ross* retroactively, although without discussion of the issue. *United States v. Cleary*, 683 F.2d 313 (9th Cir. 1982). *See also United States v. Rivera*, 684 F.2d 308 (5th Cir. 1982). The opinion in *Ross* indicates that the Supreme Court intended the rule to apply retroactively. *See* 102 S.Ct. ot 2172 ("[I]t is clear that no legitimate reliance interest can be frustrated by our decision today"). No other result makes sense. The purpose of refusing to apply retroactively a new decision enforcing the exclusionary rule is to avoid penalizing police conduct when the police reasonably relied on existing judicial precedent. *United States v. Peltier*,

422 U.S. 531, 537-39, 95 St.Ct. 2313, 2317-18, 45 L.Ed.2d 374 (1975); *see, e.g., United States v. Stewart*, 595 F.2d 500, 504 (9th Cir. 1979). When a court determines that a particular police practice does *not* violate the Constitution, there is no reason not to apply that decision retroactively. "Because the Supreme Court has declared searches such as those involved here to be constitutional, no police misconduct has in fact occurred. Hence, there is no misbehavior to be deterred, and the interest in maintaining judicial integrity is not implicated, especially in light of the previously unsettled state of the law in this area." *United States v. Burns*, 684 F.2d 1066, 1074 (2d Cir. 1982) (applying *Ross* retroactively).

B. The Applicability of *Ross*

The appellees argue that even if *Ross* is given retroactive effect, it does not apply here. They argue that the customs agents must have known that the packages contained all the contraband, so that their suspicion should have focused exclusively on the packages and not on the trucks. As a consequence, the automobile search was unauthorized and a warrant was required to search the containers under the rule of *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). *Ross* did not purport to overrule *Chadwick*.

The customs officers, however, remained some distance away while the defendants placed the packages inside the trucks. The officers did not see the packages nor have a chance to seize the contraband until after loading. The officers had probable cause to search both vehicles, not just the newly-discovered bales. Their suspicion did not focus solely on the packages; it was not obvious that all the contraband

would be in the bales. The appellees could have easily secreted other drugs elsewhere in the vehicles.

In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the police officers had all the facts giving them probable cause to believe that contraband was in the footlocker and the suitcases before those containers were placed in the trunks of the cars. Placing the containers in the cars did not give the officers probable cause to search the entire vehicle. In *Ross* and in this case, the officers' suspicions were not so specific. They did not know the exact nature and packaging of the contraband transferred from the airplanes to the trucks before arriving on the scene. The officers had probable cause to search both trucks. Under *Ross*, they also could have opened the packages as part of that search.

C. The Three-Day Delay

We next must determine whether the fact that the packages could have been searched without a warrant at the time of their seizure means that they could be searched without a warrant some three days later at the government warehouse. We believe that the clear thrust of our precedent answers that question in the negative, and that nothing held or said in *Ross* leads to a different conclusion.

In *United States v. Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981), an officer arrested a female passenger of an automobile and seized her purse, which was either in her hand, on her lap, or on the seat beside her. He did not search the purse immediately, but did so about an hour later in his office, where he had taken both the purse and its owner. We assumed that the initial seizure of the purse was lawful as incident to the owner's arrest, but held that the sub-

sequent search was invalid for lack of a warrant. It made no difference, we said, that the officer was prevented from making the search at the time of the arrest because he believed it would have created a security risk. "The fact that an officer is prevented from conducting a [permissible search at the time of the arrest] is not a sufficient reason to justify a search an hour later at the station. The protection rationale for the search no longer applies." *Id.* at 1288.

In *United States v. Burnette*, 698 F.2d 1038 (9th Cir. 1983), police officers arrested the defendant on probable cause and seized the purse she was carrying. They conducted a cursory search of the purse at that time, and subsequently conducted a more thorough warrantless search at the police station. We held that the search at the station did not violate the Fourth Amendment because the initial search, properly conducted at the time of the arrest, diminished or destroyed any privacy interest the owner had in the contents of the purse. As long as the purse thereafter remained in police possession, it could be searched without a warrant. *Id.* at 1049-50. We pointed out, however, that "[w]here such a container is not searched immediately, . . . but is instead taken to the police station and searched later, a warrant is required. *United States* v. *Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981)." *Id.* 698 F.2d at 1049. Moreover, the dissent in *Burnette* was based on the sole ground that the record did not support the finding that the officers had in fact searched the purse at the time of the arrest. *See id.* at 1052-56 (Norris, J., dissenting). Neither the majority's reference to *Monclavo-Cruz* nor the dissent would make much sense if a warrantless station-house search were rendered

lawful by the fact that an earlier search *could* have been made lawfully without a warrant.

The starting premise for both cases is that warrantless searches are *per se* unreasonable under the Fourth Amendment, subject only to narrowly prescribed exceptions confined to the circumstances that gave rise to those exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971); *see United States v. Martin*, 693 F.2d 77, 78 (9th Cir. 1982) (per curiam). Both *Monclavo-Cruz* and *Burnette* dealt with searches of items initially subject to search incident to a lawful arrest. There was no reason to stretch that exception to the warrant requirement so as to permit a later search at the police station, where "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." *United States v. Chadwick*, 433 U.S. at 15, 97 S.Ct. at 2485. In the present case, however, the containers were subject to initial search as part of the automobile exception to the warrant requirement, under the holding of *Ross*. We must therefore examine *Ross* further to determine whether anything in its rationale supports the warrantless searches conducted in this case.

The automobile exception permits a warrantless search not only at the spot where the automobile is stopped but also at the police station "soon thereafter" if the vehicle is impounded. *Ross*, 102 S.Ct. at 2163 n.9 (citing *Chambers v. Maroney*, 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970), and *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975)). This extension of the automobile exception resulted, however, from the practical difficulties associated with the detention of an automobile on

a public highway and the possible dangers of a search there. *See Chambers v. Maroney*, 399 U.S. at 52, 90 S.Ct. at 1981; *Ross*, 102 S.Ct. at 2163 n.9, 2166 n.18. Those considerations do not apply to a container that may be removed from the vehicle and secured by the police, as the Supreme Court held in *Chadwick*, 433 U.S. at 13 n.7, 97 S.Ct. at 2484 n.7.

Ross allows the police to search, either in the automobile or soon thereafter at the station, all containers, closed or open, which there is probable cause to believe may conceal the proper object of the search. *Ross* does not, however, overrule the holding of *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), that a warrant is needed for search of a closed container in the hands of the police that is not part of an automobile search itself. We therefore find nothing in *Ross's* expansion of the automobile search exception to justify extending it to containers no longer in an automobile and secured by the police for three days prior to a warrantless search.[4]

Moreover, nothing in the *Ross* decision so destroys the expectation of privacy in a container subject to an automobile search that the container is thereafter subject to search without a warrant. First, *Ross* allows the police to search all containers only if they have probable cause to search the vehicle. If there is probable cause to search only a container, the automobile exception does not apply. *Ross* did not overrule *Chadwick* or the holding in *Sanders*. *See Ross*,

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[4] *See, e.g., United States v. Cleary*, 656 F.2d 1302, 1303 (9th Cir. 1981), *vacated*, 457 U.S. 1113, 102 S.Ct. 2919, 73 L.Ed.2d 1324, *on remand*, 683 F.2d 313 (9th Cir. 1982) (search apparently occurred immediately after bag taken to police station and therefore was part of search of van).

102 S.Ct. at 2168 (quoting *Robbins v. California*, 453 U.S. at 435, 101 S.Ct. at 2850 (Powell, J., concurring)); *Ross*, 102 S.Ct. at 2172. *Chadwick* holds that placing a package in an automobile does not destroy the expectation of privacy in that package. Second, our decision in *Burnette* would never have reached the merits if the fact that the police could have (but did not) search a container forever destroys the expectation of privacy in its contents.

We again emphasize the factual basis of our holding. Customs officers had probable cause to believe the two trucks contained contraband. Under *Ross*, they could have immediately inspected the packages as part of the inspection of the trucks. The officers also could have searched the trucks and packages soon thereafter at their headquarters. Instead, they chose to seize and impound the packages. They stored the packages for three days and then opened them without a warrant.

The officers could have easily obtained a warrant at any time during those three days. Exceptions to the warrant requirement are limited and narrowly prescribed. Neither basis for the automobile exception—the impracticality of serving a warrant for the transportation of contraband, *see Ross*, 102 S.Ct. at 2163, and the special mobility of automobiles, *id.* at 2165—applies to packages secured for three days at a government warehouse.

III. *Standing*

Unlike the other five defendants, whom the officers arrested at the airstrip, Johns and Hearron had departed in their airplanes a few minutes before the search of the vehicles and seizure of the containers of marijuana. The district court found that Johns and

Hearron had standing to object to the search of the packages because they shared a bailor/bailee relationship with the other five defendants, who were not to be paid until after delivery of the marijuana. Moreover, the court found that the pilots had an interest in the packages sufficient to maintain a reasonable expectation of privacy in their contents.[5]

Unlike *Rawlings v. Kentucky*, 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980), this case does not involve a "precipitous" bailment to which the bailee had not consented. Johns and Hearron owned the drugs. *United States v. Salvucci*, 448 U.S. 83, 91, 100 S.Ct. 2547, 2552, 65 L.Ed.2d 619 (1980).[6] While the pilots lost their power to exclude others from inspecting the packages, that fact is not determinative under our precedent. *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam).[7] Like the defendants in *Perez*, Johns and Hearron have met their burden of showing a reasonable expectation of privacy based on their formalized arrangement with the other five defendants for the transportation of the contraband. The pilots' interests in the packages when opened are indistinguish-

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[5] The government does not challenge the standing of the other five defendants to object to the search.

[6] After its acquiescence at the suppression hearing, the government cannot now contend that the record does not show that Johns and Hearron had any continuing interest in the marijuana. *See Steagald v. United States*, 451 U.S. 204, 209, 101 S.Ct. 1642, 1646, 68 L.Ed.2d 38 (1981); *United States v. Anderson*, 663 F.2d 934, 938-39 n. 4 (9th Cir. 1981).

[7] *But see United States v. DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981) (no expectation of privacy in articles committed to the custody of coconspirators).

able from those of the other defendants. *Id.* The pilots have standing.

CONCLUSION

The warrantless search here violated the Fourth Amendment and the district court correctly suppressed the evidence thus obtained. Although the containers were in plain view, the marijuana inside them was not. While *Ross* holds that the officers could have searched the packages, either on the spot or shortly thereafter, the automobile exception does not allow a warrantless search of containers seized and secured by the police for three days before the search. The rationale for the automobile exception to the warrant requirement then no longer applies. Finally, the district court correctly found that Johns and Hearron had standing.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 81-188 TUC ACM

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LYLE GERALD JOHNS, ET AL., DEFENDANTS

[Filed Jan. 8, 1982]

MEMORANDUM OF DECISION AND ORDER

This memorandum and order addresses the question of the legality of a Drug Enforcement Agency's (DEA) warrantless search and taking of core samples of marijuana out of sealed boxes and garbage bags taken from five of the defendant's possession at an isolated private air strip near Bowie, Arizona.

On September 1, 1981, a grand jury for the United States District Court for the District of Arizona indicted the seven defendants. The first count of the indictment charges the defendants with conspiring to possess marijuana with the intent to distribute it and conspiring to distribute marijuana, in violation of 21 U.S.C. § 846. All of the defendants are also charged with violation of 21 U.S.C. § 841(a)(1), possessing marijuana with the intent to distribute it. The defendants have made numerous motions, including a motion to suppress evidence of the core samples of marijuana taken from the sealed bags and boxes that had been seized from the defendants camper-trucks at the air strip on August 4, 1981. In

view of the court's ruling on the motion to suppress, no rulings will be made on the other motions unless the Government indicates to the court that this matter will proceed to trial as to some or all of the defendants and rulings are necessary.

FINDINGS OF FACT

In the early morning hours of August 4, 1981, at approximately 1:30 a.m., Customs Officer Scott Eshelman received a call at his home from an unidentified informant who told Eshelman that there was suspicious activity in the form of a plane landing and being met by a car at the Tucson Dragway, just east of Tucson. Eshelman then called the Pima County Sheriff's Department and asked that they dispatch a unit to investigate the report. At the Tucson Dragway the sheriff's department stopped and identified two of the defendants in this case, Gerald Johns and Dennis Hearron, as they were leaving the Tucson Dragway. The officers who stopped Johns and Hearron were unable to detect any criminal activity by the defendants and the men were released.

After receiving the information regarding suspicious activity at Tucson Dragway from the confidential informant and notifying the sheriff's department, Customs Officer Eshelman notified his superior, Customs Officer Dale Harper, of the information he had received. Officer Harper was on his way to the Dragway when he received a message that Johns and Hearron had been identified by the sheriff's department and released.

Officer Harper had been investigating Johns for some time in the past and had information which linked Johns and defendants Carlos Leon and Manuel

Duarte to a drug smuggling operation.[1] After receiving the information that Johns and Hearron had been stopped and identified, Harper decided to go to Leon's residence and establish surveillance. Upon arriving at Leon's house, Harper found no vehicles present. He then went to Duarte's residence and found Leon's truck and Duarte's truck parked in the yard. Both trucks were covered by camper shells. Harper established surveillance. Someone came out from Duarte's residence, got in Leon's truck and drove it around to the back of the house. Soon thereafter both trucks left and went to a nearby gasoline station. There they were met by an individual driving a yellow Volkswagen. All three vehicles returned to Duarte's residence and shortly thereafter the trucks left and proceeded towards Interstate 10, the major freeway which runs east-west through southern Arizona.

When the vehicles entered Interstate 10 and proceeded east Harper contacted other customs officers

[1] Harper had been in close contact with Agent Charles Schwarz of the Narcotics Unit of the Tucson Police Department. Schwarz had made available to Harper information that indicated Johns and Leon were involved in an international drug-smuggling operation. This information was based on personal observation of Johns' activities and an extensive phone toll analysis. The customs office had received information that Johns' aircraft had been in and out of the Sierra Vista Airport, located 15 miles from the international boundary, on numerous occasions and that the plane had been flown there by both Johns and Leon. Leon had been spotted by customs officers buying fuel in four 55 gallon drums at the Sierra Vista airport on several occasions. Harper also had personal information connecting Leon and Duarte. He had observed Leon go to Duarte's place of business and take Duarte's pickup truck to a C.B. Radio Shop. He was also aware of Duarte's prior drug conviction.

and had surveillance established on the trucks. The trucks traveled about 100 miles to a private airstrip near Bowie, Arizona. By this time the customs officers had established surveillance both on the ground and through the air.

Bowie, Arizona is a small rural town in southern Arizona some 50 miles from the Mexican border. The customs officers admit that at the time they established surveillance of the vehicles and followed them to Bowie they did not know the purpose of the vehicles trip. Shortly after the two trucks stopped at a picnic ground near the air strip two small planes landed on the strip. At this time the customs aircraft was circling 10,000 feet overhead and the ground surveillance unit was approaching the air strip. The customs officers later identified the planes that landed on the air strip as belonging to the defendants Johns and Hearron. However, the customs officers admit that they did not know where the planes had come from or what the planes might contain.

The ground surveillance unit consisted of Customs Officers Gerald Young and Scott Eshelman. The ground crew had followed the trucks to the Bowie airstrip and remained a short distance away. They could not see the activity at the Bowie airstrip but they were able to see the airplanes come in for landing and could see the planes as they were taking off. The ground unit was informed by the air unit that one of the trucks had met the first airplane that landed. They then received instructions from the air unit to investigate the trucks.

When the ground unit officers approached the trucks they were parked back to back under some trees. Officer Eshelman parked his car about thirty

yards from the trucks. He got out with his gun drawn, not to make an arrest, but for his own safety because of the remoteness of the area and the number of suspects. The defendants were in an area behind the trucks when the officers approached. Eshelman ordered the defendants to come out from behind the trucks and lie on the ground. When Eshelman first approached the area he noted that one of the defendants was throwing a blanket over the containers in the back of a truck and was closing the back of the truck. Officer Young approached the scene as Officer Eshelman was getting out of his car with his gun drawn. Officer Young asked Officer Eshelman to check the vehicles for the presence of other people. As Officer Eshelman approached the trucks he detected what he believed was the odor of marijuana. Officer Young testified he saw dark plastic wrapped around what appeared to be square packages or containers. He further testified that from his experience he knows that marijuana is commonly wrapped in this manner. Eshelman had proceeded to the truck with the closed back end and informed Young that there was marijuana in both trucks. All of the testimony indicates that what the officers saw at the airstrip were square boxes wrapped in dark plastic and sealed with tape. The plastic bags are common green trash bags.[2]

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[2] A dispute later arose as to what the officers actually saw. The hearing on the motion to suppress was held on November 9, and November 10, 1981. The government and the defendants presented all of their testimony and the matter was continued to December 4, 1981, for oral argument. The motion to suppress was argued by counsel on December 4. At the conclusion of the arguments the court took the matter under advisement and scheduled all further motions for

After securing the picnic area and viewing the sealed containers the officers handcuffed and arrested the defendants. They were read their *Miranda* rights

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hearing on December 11, 1981. The court at the December 4th hearing made some statements which indicated its disappointment that a warrant had not been obtained before opening the containers which had been seized by customs at the airstrip. From the court's statements it was clear that there was a good possibility that the motion to suppress might be granted because there had been no testimony that the customs officers had seen any marijuana when the contraband was seized nor were the contents of the containers readily ascertainable because of the shape or other characteristics of the containers which would put the contents "in plain view". The court indicated, as it now finds as fact, that sufficient facts had not been presented to convince the court that what the officers observed could have only been marijuana.

On December 11, 1981, the time scheduled for a hearing on the defendant's other motions, the government moved to reopen the hearing on the motion to suppress. The court granted the motion. Officer Eshelman then testified that after the arguments on the motion to suppress he had talked to Officer Young. Officer Young had explained that there was no evidence presented at the hearing of November 9-10, 1981 that marijuana was seen by the officers at the time the containers were seized and that the case might be lost because no search warrant was obtained before DEA opened the containers. After talking to Young, Eshelman went to the DEA Office and took some pictures of the bags which were allegedly already torn at the time they were seized. Eshelman testified that when he approached the trucks at the airstrip he lifted a blanket which was covering the containers and saw that several of the bags were torn and saw that the contents of several of the bags was a leafy green substance which he believed was marijuana.

On cross-examination Officer Eshelman admitted that none of the reports prepared by the Customs Service indicated that marijuana was visible at the time the containers were seized, that he did not recall ever telling the U.S. Attorney that

and advised they would be transported to the DEA Offices in Tucson, Arizona. After arresting the defendants, Officers Young and Eshelman went to the airstrip. At this point they spotted what they believed to be marijuana debris on the ground. The officers did not seize the debris nor test it. What the documentary evidence reveals is that the officers spotted some ambiguous small twigs which they believed were marijuana.

Several days after the containers had been secured at the DEA warehouse, the DEA officers opened the containers and took samples for testing. Subsequent tests proved that they contained marijuana. Counsel

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marijuana was visible at the time the containers were seized, that he attempted to take pictures of the torn bags showing the marijuana but they did not turn out, that the documentary evidence which was available to the court unequivocally illustrated that what the law enforcement officers seized at the airstrip were fully sealed boxes covered by opaque, sealed, green garbage bags commonly used in the home, and that he did not know when the bags were torn as shown in his subsequent pictures of the seized items taken at the DEA warehouse but that he knew his pictures were taken after the DEA had taken the core samples from the containers.

The officers' testimony regarding the sighting of marijuana at the time of the seizure is "suspect at best." This is not a simple case involving possession of a small amount of marijuana. It is obviously a case on which the government spent a great amount of time and money. The officers involved in the arrest are experienced law enforcement officers with many years of on-the-job experience, including the investigation of marijuana cases. It is difficult for the court to believe that in preparation for the hearing on the motion to suppress, the subject of whether marijuana was visible at the time of the seizure did not arise. The circumstances under which the testimony was finally presented makes it unreliable and the court cannot, in fairness to all parties, give the testimony of December 11 any weight.

have stipulated that no warrant was obtained before opening the containers.

After the two planes departed the Bowie airstrip they were followed to Tucson by the customs officers. Defendants Johns and Hearron were arrested in the Tucson area upon landing. The customs officers seized debris inside the plane of Johns which they believed was marijuana but subsequent testing of the substance proved that this was not correct.

CONCLUSIONS OF LAW

The question presented to the court is whether the warrantless search of the sealed boxes and bags found in the beds of the defendants' trucks at the Bowie airstrip was illegal, requiring the suppression of the evidence seized therefrom? In *Robbins v. California*, —— U.S. ——, 101 S.Ct. 2841 (1981), the Supreme Court held that the Fourth Amendment protects peoples' effects whether they are "personal" or "impersonal", that a closed, opaque container may not, as a general rule, be opened without a warrant even if found during the course of a lawful search of an automobile, and that the opening of closed containers which contained bricks of marijuana without a search warrant during the lawful search of an automobile violated the Fourth and Fourteenth Amendments of the United States Constitution.

The court finds the holding of *Robbins*, *supra*, controlling in the case at bar. If a defendant had a reasonable expectation of privacy in the articles seized from him by a law enforcement officer that officer must either obtain a warrant for the search of the item or in order to avoid obtaining a warrant bear the burden before a court of law to demonstrate that a warrant was not necessary because the circum-

stances of the case fall within one of the carefully delineated exceptions to the Fourth Amendment warrant requirement. In *Robbins, supra,* the Supreme Court makes clear that the nature of the container does not matter when making the determination as to what articles are entitled to Fourth Amendment protection. The only exception to this coverage is if the seized article could be one which could only contain contraband. As in *Robbins, supra,* the court is not convinced by the credible evidence presented that the seized containers could have only contained contraband.

Once it is established that a defendant has a reasonable expectation of privacy in the item seized a warrant must be obtained unless the government can establish that an exception to the warrant requirement is applicable. No exception to the warrant requirement was established in this case. Although smelling marijuana will give a law enforcement officer a right to legitimately search a vehicle and seize suspected contraband therefrom, *United States v. Garcia-Rodriguez,* 558 F.2d 956 (9th Cir. 1977) this information does not give law enforcement officers a right to search the item seized without first resorting to a neutral magistrate for obtaining a search warrant. *Robbins, supra; Sharpe v. United States,* 660 F.2d 967 (4th Cir. 1981); *United States v. Rivera,* 654 F.2d 1048 (5th Cir. 1981); *United States v. Dien,* 609 F.2d 1038 (2d Cir. 1979).

Neither the automobile exception nor the exigent circumstances exception to the warrant requirement are applicable in the present case. The defendants were arrested and the contraband secured at the DEA warehouse before the DEA officers decided to open and take marijuana samples from the bags

without receiving a warrant. Nor is the plain view exception to the warrant requirement applicable because the evidence presented convinces the court that the marijuana was not in plain view prior to the opening of the seized items.

The court's decision is mandated by the Supreme Court's ruling in *Robbins v. California, supra.* The government has attempted to distinguish the case at bar from *Robbins* in two ways. First, the government argues that the defendants cannot be given a reasonable expectation of privacy in numerous bags and boxes of marijuana. Secondly, the government contends, that even if the defendants do have a reasonable expectation of privacy in the contents of the seized items they cannot complain, under the facts and circumstances of this case, of the DEA's failure to obtain a warrant because the seized items could have only contained marijuana.

The government relies on *United States v. Gooch,* 603 F.2d 122 (10th Cir. 1979) for the proposition that when a cargo or numerous containers are seized the owners of the containers do not have a reasonable expectation of privacy in the seized items. In *Gooch,* the Tenth Circuit wrote, "We decline to read into the summary Supreme Court action in *Robbins* the implicit adoption of a per se rule that would hold a warrant required before any form of container or package found in a vehicle could be searched," 603 F.2d at 126. However, the later *Robbins* decision makes clear that a reasonable expectation of privacy can be held in other than personal effects: "[The Fourth] Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal' ". *Robbins, supra,* at 2846. The Supreme Court's reason for adopting a "bright line

rule", which the *Gooch* court refused in 1979 to read into the Supreme Court's action of summarily vacating the California Court of Appeals decision in *Robbins*, was to end confusion for law enforcement officers in their determination of when a warrant was required. As Justice Powell wrote in his concurring opinion:

> The plurality's "bright-line rule" would extend the warrant clause of the Fourth Amendment to every "closed, opaque container," without regard to size, shape or whether common experience would suggest that the owner was asserting a privacy interest in the contents. The plurality would exempt from the broad reach of its rule only those "closed, opaque containers" where, because of shape or other characteristic, the "contents may be said to be in plain view."

Robbins, supra, at 2847, footnote 1.

The defendants in this case manifested a reasonable expectation of privacy in the contents of their trucks. The trucks had camper shells over them and the windows of the camper shells were covered with an opaque cellophane which kept persons walking by the truck from being able to observe the contents of the bed of the truck. The trucks were either closed or the contents of the trucks had blankets thrown over them. Most important, the seized contents were either in cardboard boxes or in double, opaque, green bags that were sealed with a thick tape. These articles have been accorded a privacy expectation even when found in bulk. *Sharpe v. United States, supra*; *United States v. Rivera, supra*; *United States v. Pillo*, 522 F. Supp. 855 (M.D. Pa. 1981). The court finds, given all the facts and circumstances of the

case, and in accordance with *Robbins* and its progeny, that the defendants held a reasonable expectation of privacy in the contents of their trucks.

The government asserts that though the defendants may have a reasonable expectation of privacy in the contents of the trucks, under the circumstances of the case the seized boxes and bags fall within the exception noted in *Robbins*, that given their shape or characteristics the seized items could have only contained marijuana. In support of this contention the government points out that the customs officers who seized the contents of the trucks had been involved in similar drug arrests, had personal experience with these kinds of containers, had been participants in a surveillance operation which noted two planes landing near the trucks, and had personal knowledge that at least one of the individuals had been previously involved in illegal activity. Furthermore, the officers testified that they smelled marijuana in the area of the trucks shortly after apprehending the suspects. Given all these facts, the government contends the containers could have only contained marijuana.

The court is not convinced, given all the facts and circumstances of the case, that the officers had sufficient information to conclude that the containers could have only contained marijuana. Several incidents which occurred in the investigation of this matter illustrate the danger of the court's drawing the conclusion desired by the government. When the sheriff's department stopped Johns and Hearron in the early morning hours of August 4, 1981 it was because an informant had called a customs officer and told him that a plane and a car were meeting at the Tucson Dragway. Because customs had information that one of the persons who reportedly used the

Dragway was involved with drugs they went to the dragstrip, but the men were apparently not engaged in illegal activity. Later in the day, when these two men were again stopped after landing near Tucson, the officers seized what they testified they believed was marijuana. A subsequent chemical analysis revealed that this was not the case. Certainly, by looking at the bags and boxes seized at the air strip there is no way to determine that the seized items contained marijuana or for that matter any illegal substance. Neither the shape nor any other characteristic of the seized containers made their contents readily ascertainable. In short, the court has not been convinced by the evidence presented that an exception to the warrant requirement existed given the facts of the case. It would have been a simple matter for the DEA officers to apply to a neutral magistrate for the issuance of a warrant. Having failed to do so and having failed to convince the court that the facts excused them from so doing, it is the court's conclusion that the evidence seized from the defendants at the airstrip near Bowie must be suppressed.

IT IS ORDERED that the Motion to Suppress is granted as to all defendants except Johns and Hearron. Although these defendants joined in the Motion to Suppress, the record is silent as to their claimed interest in the suppressed evidence. If these two defendants desire to be heard further on this issue they should file legal memorandum as to their positions and notice the court for hearing.

DATED this 8th day of January, 1982.

/s/ Alfredo C. Marquez
ALFREDO C. MARQUEZ
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 81-188 TUC ACM

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LYLE GERALD JOHNS, ET AL., DEFENDANTS

[Filed Feb. 3, 1983]

ORDER

This order and memorandum addresses the question of the defendants Johns and Hearron's standing to object to the introduction of illegally searched bags of marijuana. This Court's order of January 8, 1982 explains the facts and law upon which the court's original ruling is based. The Court suppressed the searched evidence as to five of the defendants but reserved ruling as to Johns and Hearron because the record was apparently silent as to these defendants claimed interest in the suppressed evidence. After a further hearing and oral argument it is the Court's ruling that Johns and Hearron have standing to object to the introduction of the illegally searched evidence and the Court's order of January 8, 1982, is applicable to them.

There are two grounds upon which standing is conferred upon the defendants. First, after a review of the record and the avowals made by the defendants, acquiesed [*sic*] to by the Government,[1] the court finds

[1] The government did not seriously contest any of the defendants standing at the Motion to Suppress. Only after the

Johns and Hearrons' position with regard to the totality of factors courts use to determine whether defendants have standing to object to constitutional violations is not in any meaningful way different from that of the other defendants in this case.

The evidence at the suppression hearing, in addition to that already enumerated in the Court's previous order, revealed that the persons who picked up the bags of marijuana at the air-strip were not to be paid for their participation until they delivered the marijuana to another destination. The defendants Johns and Hearron were identified by customs agents as the registered owners of the planes that were seen landing at the air-strip and were apprehended later in the same day while piloting those planes Johns and Hearron have made avowals to the Court, acquiesed [*sic*] to by the Government, that they were in a bailor/bailee relationship with the defendants who picked up the marijuana. Johns and Hearron avow that they were to drop the marijuana to the other defendants in Bowie and then were to have the marijuana returned to them at a later date. In *Rawlings v. Kentucky*, —— U.S. ——, 100 S.Ct. 2556 (1980), the Supreme Court evidently recognized the bailment relationship could be the kind of relationship to which an expectation of privacy could be accorded under proper circumstances. Looking at the totality of relevant factors the only factual difference between Johns and Hearron and the other defendants is that

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court's initial ruling and query regarding Johns and Hearron's standing did the government make any argument regarding these defendant's standing. For the effect of the Government's acquiescence to questions of fact regarding standing, see, *Steagald v. United States*, —— U.S. ——, 101 S.Ct. 1642, at 1646 (1981); *United States v. Anderson*, No. 80-1684 (9th Cir., decided December 14, 1981, at 6085, n. 4.

the former were not present or in possession of the evidence when it was seized but had left the scene moments earlier. The government does not contend that Johns and Hearron abandoned the bales or in any way lessened their interest or expectation of privacy in the seized items. Cases cited by the Government in their brief in opposition to Johns' and Hearron's standing are distinguishable. Accepting the defendant's assertions as true, the Court finds that all of the defendants have asserted a sufficient interest in the property and evinced identical expectations of privacy in the seized goods sufficient to confer standing to object to a constitutional violation of their seized property.[2]

A second, equally compelling reason for according Johns and Hearron standing was explained in *United States v. Rakas* [*sic*], 439 U.S. 128, 99 S.Ct. 241 (1978). In *Rakas, supra*, the United States Supreme Court held that the focus of the inquiry in a determination of a defendant's standing to object to the admission of illegally obtained evidence is whether the defendant's rights were personally violated by the allegedly illegal search or seizure. Under this view, regardless of Johns' and Hearron's right to contest the legality of the seizure, they do have a right to contest the legality of the search. In this case, it is not the seizure but the search which resulted in the illegality. Johns and Hearron have established they maintained an interest in the property and that interest was maintained through the time of the illegal search.

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[2] *See Robbins v. United States* [*sic*], *infra*, and this court's order of January 8, 1982 for the justification for the evidence seized in this case as being entitled to a "reasonable expectation of privacy" for Fourth Amendment and warrant requirement purposes.

Therefore, the court's findings of January 8, 1982 with regard to the reasonable expectation of privacy which was evinced by the property seized is equally applicable to Johns and Hearron. Their rights were personally violated when their property, which evinced objective indices of being entitled to a reasonable expectation of privacy, was illegally searched. Therefore they may object to the illegality.

The Government's motion to stay the order of January 8, 1982, until the Supreme Court reconsiders *Robbins v. United States* [*sic*], 453 U.S. ——, 101 S.Ct. 2841 (1981) in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981), cert. granted 50 L.W. 3278, October 13, 1981 is denied.

Page 8, line 14 of the Court's order of January 8, 1982 is amended to reflect that suspected marijuana debris was found in the plane of Hearron as opposed to Johns.

IT IS SO ORDERED.

2/2/82

/s/ Alfredo C. Marquez
ALFREDO C. MARQUEZ
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1080
DC CR 81-0188-01)
81-0188-07) ACM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

vs.

LYLE GERALD JOHNS, DENNIS EUGENE HEARRON, MANUEL JESUS DUARTE, CARLOS TORRES LEON, JOSE OROS SOTO, ROBERTO LEON GOMEZ, and JOHN LIZARAGA REDMOND, DEFENDANTS/APPELLEES

Appeal from the United States District Court
for the District of Arizona (Tucson)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 10, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 82-1080

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

LYLE GERALD JOHNS, ET AL., DEFENDANTS-APPELLEES

[Filed Jan. 4, 1984]

ORDER

Before: TRASK, ANDERSON and CANBY, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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